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CITATIONS

CASES:

MISCELLANEOUS:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 441

AMERICAN SAFETY TABLE COMPANY, *Petitioner*

v.

SINGER SEWING MACHINE COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION [1]

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Op. 41-54)[2] is reported at 169 F. 2d 514, 539.

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[1] This case is a companion case to *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 439-440, this Term (the *Root* cases). As in the *Root* cases, the United States, although designated as *amicus curiae*, was more than merely *amicus*. The court below authorized the appearance of the United States as *amicus* by its order of June 20, 1947 (Op. 43). The duties of the United States in the court below, as in the *Root* cases, were to "present to the court the available evidence bearing upon the charges whether or not in support thereof, to the end that the truth might be ascertained' (Op. 44-45).

[2] Petitioner here, as in the *Root* cases, has moved to dispense with printing of the voluminous record for the purposes of the petition for writ of certiorari. The United States does not oppose the granting of this motion. However, in the *Root* cases, we have filed printed copies of the opinion below in these cases which includes the opinion in this case. The references in this brief to (Op. .....) are to that printed opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered July 6, 1948. The time for filing a petition for writ of certiorari was extended on September 10, 1948, by Mr. Justice Burton to and including December 1, 1948. The petition for writ of certiorari was filed on December 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the exercise of its inherent power to protect the integrity of its judgments, a court of appeals has jurisdiction (a) to institute after the expiration of the term an inquiry into whether a judgment has been tainted by corruption; (b) to hear the evidence relative thereto; and (c) upon finding that the judgment was corrupt, to direct that the judgment be vacated and the complaint dismissed, although respondent Singer Sewing Machine Company originally prayed only for reargument.

2. Whether the evidence here supported the court's finding that American Safety Table Company employed Morgan S. Kaufman with the expectation that he would improperly influence the action of Judge J. Warren Davis, formerly a judge of the Circuit Court of Appeals for the Third Circuit, in this case.

STATEMENT

On March 9, 1938, a court consisting of Buffington and Davis, Circuit Judges, and Johnson, District Judge, in an opinion by Judge Buffington, reversed the decision of the District Court of the Eastern District of Pennsylvania and held that a patent of American Safety Table Company (American) was valid and infringed by Singer Sewing Machine Company (Singer), 95 F. 2d 543. After this Court's denial of certiorari (305 U. S. 622), the case was remanded to the district court where a master was apopinted to take account of damages and profits.[3]

After the adverse decision in the district court, American had added a New York patent firm to its staff on the case, and after its main brief in the appeal was filed, it put the appeal in charge of Morgan S. Kaufman, who retained Thomas G. Haight and Samuel E. Darby, patent practitioners, who prepared reply briefs and argued the appeal. (Op. 41-42.)

On September 26, 1944, after the court below on June 15, 1944, had vacated its original judgments in the *Root* cases (Br. for U. S. in Opp. in Nos. 439, 440, pp. 4-5), Singer filed a petition with the court below for recall of mandate and for reargument on the merits on the ground that there had existed a corrupt and illicit combination between Kaufman

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[3] The proceeding before the master is still pending.

and Judge Davis to obstruct justice.[4] In reply, American denied, *inter alia*, any improper conduct on its part or the existence of any unlawful combination between Davis and Kaufman in this case. The questions thus raised were argued before the court below March 6, 1945, and decisions was withheld during the proceedings then pending in the *Root* cases. On June 20, 1947, the court simultaneously with its similar order in the *Root* cases (Br. in Opp. Nos. 439-440, pp. 5-6), ordered American to show cause why the relief prayed by Singer should not be granted by reason of American's alleged corruption practiced on the court, and further authorized the Attorney General to appear as *amicus*. In reply, American reaffirmed its denial of any improper conduct in this case on its part or on the part of Kaufman. The designation of the judges for this case was made by the Chief Justice and proceedings were taken paralleling those in the *Root* cases (Br. in Opp. Nos. 439-440, pp. 6-7).

On April 6, 1948, the court issued an order substantially the same as that issued in the *Root* cases

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[4] The petition also charged that Judge Buffington was disqualified to sit in the bearing of the appeal because of the infirmities of old age and his consequent reliance upon Judge Davis. By supplement to the petition, Singer charged that Judge Johnson was also disqualified and unfit to participate by reason of his improper official conduct as District Judge in the Middle District of Pennsylvania as set out in Report No. 1639 of the House Committee on the Judiciary, 79th Cong., 2d sess.

(Br. in Opp. Nos. 439-440, pp. 7-9). In this case, the court, as it formulated the charges that had been made,[5] undertook to determine, *inter alia* (Op. 44):

> (c) Whether Morgan S. Kaufman was employed or retained by American Safety Table Company in connection with this case and, if so, whether the purpose of such employment or retainer was with the expectation of American Safety Table Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with this case.[6]

This case was consolidated for trial with the *Root* cases, as subsequently stipulated, to the extent that the testimony of the witnesses and the exhibits in that case should be offered, as part of the record here, subject to objection on the ground of admissibility and without limitation upon the right of either party to offer additional testimony. Hearings of the testimony were begun on May 10, 1948

[5] The United States and Singer had filed statements alleging the substance of these charges (Documents N, P, and R which are on file with the Court as part of the original transcript).

[6] At a subsequent pretrial conference at which the question whether the inquiry should be limited to the propriety of vacating the court's original judgment and submitting the case to the court for reargument, the parties, including American, assented to the hearing of the case upon the issues formulated in the order of April 6 and that the court should not restrict itself, in case the charges were sustained, to ordering a reargument on the appeal (Op. 45).

and were conducted in accordance with the order of April 6 and the stipulation of the parties.

On July 6, 1948, the court issued its findings and opinion based on the evidence introduced at the hearings. It found that Kaufman "had only one asset to offer his employer [American], and that was, his personal intimacy and influence with Judge Davis. We cannot escape the conclusion that it was for this purpose, and this purpose only, that he was employed by American in this case." (Op. 52.) In view of this finding, the court, applying the principle that one who comes into a court of equity must come with clean hands and a suitor who does not have clean hands will be denied all relief, whatever the merits of his claim, ordered that its original mandate be recalled, that its original judgment be vacated and the case remanded to the district court with directions to vacate its judgment and dismiss the complaint (Op. 53).

ARGUMENT

The primary questions raised by American's petition are, as in the *Root* cases, factual in nature. Here, as in *Root*, the jurisdictional contentions advanced have been passed on and rejected in *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575. Moreover, no questions of law on the merits are raised; petitioner does not question that if the findings below are supported by ample evidence, the court below had power at least, to vacate its judgment and order reargument. Pe-

titioner does, however, attack the court's findings of fact; these findings were made by the same specially designated court that made the findings in the *Root* cases, and are, we submit, clearly supported by ample evidence. There is, accordingly, no reason for this Court to review factual questions which of themselves do not warrant certiorari.[7]

1. *Jurisdictional Contentions*: (a) The fallacy in American's contentions that the court was without jurisdiction because there was no "case or controversy" pending before it (Pet. 35-36) and that the court, as an appellate court, was without jurisdiction itself to hear the evidence bearing on the charges of fraud perpetrated on it (Pet. 32-34) has already been discussed in our Brief in Opposition in the *Root* cases (pp. 11-15), to which we respectfully refer the Court. As to the "case or controversy" argument, there is an additional reason on the facts of this case why the contention is unsound; here, unlike the *Root* cases, the party against whom the court's original judgment was entered is actively interested and participated in the proceedings in the court below.

(b) American's further claim that the court is without jurisdiction to inquire into the integrity of one of its judgments after the expiration of the

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[7] Contrary to petitioner's suggestion (Pet. pp. 24-25) "the well settled rule * * * [is] that an appellate review is not essential to due process of law, but is a matter of grace." *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536, and cases there cited.

term in which the judgment was entered was squarely rejected by this Court in the *Hazel-Atlas* case. It was there pointed out that "where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away" (322 U. S. at 245). See, also, *Art Metal Works* v. *Abraham & Straus,* 107 F. 2d 940 (C. C. A. 2); *id,* 107 F. 2d 944 (C. C. A. 2), certiorari denied, 308 U. S. 621.

(c) American's final contention that the court improperly went beyond the relief prayed by Singer for reargument of the appeals, and ordered the complaint dismissed ignores the nature and effect of the proceedings below. Although Singer called the court's attention to the possible corruption in the judgment in its petition for reargument, the inquiry into the integrity of that judgment was not purely a controversy between private litigants but rather an inquiry into "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas* case, 322 U. S. at 246. And accordingly, the court's disposition of the case is measured against the wrong done to these institutions, and not merely by the relief prayed by an adverse private litigant. See *Hazel-Atlas* case, 322 U. S. at 250-251. Moreover, American failed to object to the court's proposal that it not restrict

itself to ordering reargument, if the charges were sustained (Hearing of March 23, 1948, pp. 162, 164), and thereafter explicitly assented to this procedure. See *supra*, p. 5; fn. 6, p. 6.

2. *Factual Questions*: As in the *Root* cases, American's attack on the findings that it employed Kaufman for the purpose of improperly influencing Judge Davis' action in this case does not warrant an exception from the usual rule against review of factual questions. These findings were made by an unanimous court, composed of three judges who normally do not sit in the Third Circuit and who were specially designated by the Chief Justice to act in this case. The findings were arrived at after the court itself heard the testimony and observed the demeanor of the witnesses in the course of direct and cross examination (cf. Rule 52(a) of the Federal Rules of Civil Procedure), and are supported by ample evidence, as the court's findings of subsidiary facts clearly demonstrate. These subsidiary findings, which are largely undisputed except as to the inferences and conclusions to be drawn therefrom, may be summarized as follows:

Since this case was thought to be of great importance to American, American had as its leading attorney in the district court, Augustus B. Stoughton, the dean of the Philadelphia patent bar, who had practiced law since 1888 and who was thoroughly familiar with conditions in the Third Cir-

cuit. When the case was lost, the firm of Levinsohn, Neiner and Levinsohn, a New York patent firm, was also retained. After the main appellate brief was filed, the Frankel brothers, who had established American and owned its stock, were not satisfied. Louis Frankel, American's president, determined to go to New York to confer with the well-known law firm of Otterbourg, Steindler, Houston and Rosen, which had guided the Frankel family in legal matters since 1920. Charles A. Houston of that firm was familiar with patent matters and actually conducted the final proceedings for an accounting before the master in this case. (Op. 47-48.) Thus, as the court commented (Op. 48), "Obviously American did not lack access to experienced men who could aid them in the selection of an additional counsel for the appeal if any were necessary."

On his visit to New York, however, Louis Frankel did not visit either the Otterbourg or the Levinsohn firm. Instead, his brother David Frankel took him to see Murray Becker, the attorney for William Fox. In the course of the visit having to do with business transactions between the Frankels and Fox, the Frankels and Becker discussed this case, and Becker advised the Frankels to retain Kaufman to handle the appeal for them (Op. 48).[8]

Thus it was Murray Becker, Fox's attorney, who recommended the retention of Kaufman. Becker

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[8] Kaufman was disbarred from practice in the court below on November 10, 1944 (Op. 53, fn. 9).

was well acquainted with the Circuit Court of Appeals for the Third Circuit, and especially the Court composed of Judges Buffington, Davis and Thompson. With Kaufman retained as local counsel he had appeared successfully (on a $10,000 plus contingent fee basis) before that court as counsel for Fox in *Altoona Publix Theatres Inc.* v. *American Tri-Ergon Corporation* (opinion by Judge Buffington, dated August 6, 1934), 72 F. 2d 53, reversed, 294 U. S. 477. Becker had also achieved remarkable success for the Fox interests in the appeals to that court in the Fox bankruptcy matters.[9] During the course of this bankruptcy litigation, which was still in active progress at the time Becker recommended Kaufman to the Frankels, Becker had ample opportunity to learn that Davis and Kaufman were on intimate terms and that Davis' personal financial affairs had reached a crisis. Moreover, subsequently in 1940, when the relationship between Fox, Davis and Kaufman was under investigation, it was Becker who called Kaufman, to arrange a conference between Davis and Fox. (Op. 48-49.)

When Kaufman was retained, the Frankels agreed to advance him $5,000 to pay the lawyer's fees and costs of the appeal, and in addition, promised him 25% of any money which American might

[9] In the *Root* cases, the court found that there had existed an illicit conspiracy to obstruct justice among Davis, Kaufman and Fox in regard to these appeals (Op. 39).

recover from Singer, against which percentage the $5,000 was to be credited. American did pay Kaufman $5,000, and he retained Thomas Haight of Jersey City and Samuel Darby of New York, well qualified patent lawyers who prepared the reply brief with the aid of the Levinsohn firm and argued the case in the Court of Appeals. Kaufman paid Darby $1,750 and Haight $1,250 for these services, and kept $2,000 for himself. Subsequently, when certiorari was sought and denied, Kaufman received an additional $1,500 from American; he paid Darby $500 for preparing the brief in opposition and kept $1,000 himself. Thus, the lawyers who did all the actual work received $3,500 in the aggregate and Kaufman retained $3,000 himself. In addition, of course, Kaufman had a 25% interest in American's claim of $737,450.62, against Singer (Kaufman's interest amounted to about $184,000); although the master initially awarded only $40,362.97, American excepted to the award as insufficient on the ground that the master failed to take into account certain devices of Singer's, which American claimed to be infringements of the patent. The decision on that question has been held in abeyance pending this proceeding (Op. 50-51).[10]

The court further found that despite the sums actually paid and the promise of large additional

[10] The decision of the district court on the master's award would, of course, have been appealable to the Third Circuit.

payments in case of success, Kaufman was not competent to make any legitimate contributions to the case, and that he in fact made no such contributions (Op. 51). Although Frankel testified that Kaufman was retained as general counsel in this case, so that he might in turn retain competent patent lawyers to prepare the reply brief and argue the case in the appellate court, Kaufman himself, though experienced in bankruptcy matters, was not competent to argue or brief a patent case. After his appointment as the receiver in bankruptcy in S. W. Strauss Company, his main occupation, apart from the receivership, had been the buying and selling of securities on the stock market; he practically gave up the practice of the law. Furthermore, he was not needed as local counsel; there is seldom need for local counsel in respect to a case in the Court of Appeals, and if such need had arisen, Kaufman, whose headquarters were in New York, was not conveniently available, whereas Stoughton maintained his offices in Philadelphia where the court holds its regular sessions and the clerk's offices are located. (Op. 50.) Moreover, the court found that Kaufman rendered no substantial legal services in the litigation. His file contained only copies of the opinion, briefs and other papers prepared by the patent lawyers. While it also contained 61 letters written by or to him about the case, they were routine in nature and showed merely that his interest in the progress of

the case, arranging conferences and conveying information from the Frankels to Darby, were due, in large measure, to his substantial contingent share. "Nothing in the file indicates that he made any intellectual contribution to the case or performed any routine service that would not have been performed as a matter of course by the active lawyers in the case if Kaufman had not been employed." (Op. 51-52.)

These findings, that Kaufman was recommended by Murray Becker, who was well acquainted with the conditions in the Third Circuit, particularly the relationship between Davis and Kaufman; that Kaufman was retained at a substantial fee; and that he was neither competent to, nor in fact did, perform any legitimate services in connection with the case, are ample, we submit, to support the court's conclusion that Kaufman had only one asset to offer his employer, and that was his personal intimacy and influence with Judge Davis. "We cannot escape the conclusion that it was for this purpose, and this purpose only, that he was employed by American in this case." (Op. 52.)

CONCLUSION

The court below had jurisdiction to proceed as it did in this case and its findings are supported by ample evidence. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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